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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 687.

LOUIS CLIFFORD, SAM GIAIMO and JAMES THOMAS,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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1. Respondent asserts, in substance, that "the only issue" is whether a court has "inherent power to regulate procedure and decorum in its courtroom while in session" and to punish, as contempts, acts which are committed in its presence and interfere with that judicial function. (Resp. Br. 4.) Respondent's statement of the "issue" is not only erroneous but completely begs the question. That, either inherently or by statute, Ohio courts possess such power is not, and never has been, questioned in this proceeding. Instead, the federal question presented below and in this Court is whether the exercise of that judicial power is subject to the First and Fourteenth Amendments to the Federal Constitution and, if so, whether, in the instant proceedings, the Ohio courts violated the freedom of the press guaranteed by those amendments.

2. Respondent's contentions, that no substantial federal question is involved and that the decision below was based only on State law, are severally untenable. (Resp. Br. 2-3.)

First: Contrary to Respondent's contention (Resp. Br. 2, 14-5, 23), this Court has never held that the rights and liberties guaranteed by the Federal Constitution have no application to contempt proceedings whenever the allegedly contemptuous act occurred in the presence of the court; and the cases cited by Respondent do not support its contention.

In *Fisher v. Pace*, 336 U. S. 155, an attorney had been found guilty of contempt for his conduct during a trial. The only ground upon which certiorari was sought and granted was a claim that, as a matter of procedure, the petitioner had been denied due process of the law in violation of the Fourteenth Amendment. (l.c. 159.) Respondent's quotation from the majority opinion is only part of a statement that, where an alleged contempt is committed in the presence of the court, summary conviction and punishment constitutes due process of law provided that the facts, on review, are found adequate to support a conviction. (l.c. 159-60.) This Court held the Fourteenth Amendment applicable but not violated; and any rights of petitioner under the First Amendment were not raised or considered. In a dissenting opinion, which concluded that the facts did not support the conviction for contempt, two justices, as part of a preliminary review of the narrow limits of judicial power summarily to punish for contempt, said:

> "In *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida*, 328 U. S. 331; and *Craig v. Harney*, 331 U. S. 367, we narrowly restricted the power to punish summarily for constructive contempts in order to maintain freedom of press and of speech in their preferred position. Freedom of speech in the courtroom deserves the same protection." (l.c. 163.)

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The statement which Respondent cites and quotes from the opinion in *Bridges v. California*, 314 U. S. 252, 266 (Resp. Br. 2, 14-5) plainly does not, as Respondent contends, stand for the proposition that the rights and liberties guaranteed by the First and Fourteenth Amendments to the Federal Constitution have no application to contempt proceedings whenever the allegedly contemptuous act was committed in the presence of the court. The error in Respondent's construction of the language cited and quoted from the opinion in the *Bridges* case is emphasized by the following facts. The Justice, who wrote the *Bridges* opinion, subsequently concurred in the language hereinbefore quoted from a dissenting opinion in *Fisher v. Pace*, 336 U. S. 155, at 163, and wrote the opinion in *In Re Oliver*, 333 U. S. 257. In the *Oliver* case, numerous constitutional limitations upon a court's power summarily to punish alleged contempts committed in its presence are reviewed. (l.c. 273-8.) Manifestly, Respondent's construction of the language quoted from the *Bridges* opinion cannot be reconciled with either of the foregoing and subsequent opinions.

Indeed, it is clear that the trial court could not have summarily punished either Petitioner Clifford or Petitioner Thomas for their alleged contempt.

Second: Respondent contends that the decision below was based (presumably solely) upon State law because the State courts held that certain State statutes did not require all orders to be in writing and journalized and that the proceeding came within the purview of another State statute. (Resp. Br. 2-3.) This contention is patently erroneous for several reasons.

(a) Where, as in the instant proceeding, a controlling issue is whether state action, legislative or judicial, violates a federal constitutional right claimed by one before the

court, a decision, which denies the federal constitutional right, can not rest upon state law. Unless the claimed right is sustained under state law, the unavoidable question is whether state law contravenes the federal constitutional right.

(b) The State courts expressly held:

> "The constitutional right of freedom of the press was not violated by an order of the court in the proceeding which was the subject of this action and *that claim is therefore overruled.*" (Pet. App. A, 35, 41.)

(c) The interpretation of the State statutes cited by Respondent (Resp. Br. 2-3) was irrelevant to the federal question presented and was an issue in the State courts solely because the written charges against the Petitioners were that they had violated "an express order." (Pr. R. 2.) Manifestly, the written charges defined and limited the things for which Petitioners could lawfully be found guilty of contempt.

3. Respondent asserts in substance that the rights granted by the First and Fourteenth Amendments are subordinate to the personal views and preferences of a state court judge; for they repeatedly contend that a violation of any "express order" is contempt *per se* upon the theory that in law, even though not in fact, it obstructs the administration of justice. (Resp. Br. 5, 6, 18.) Respondent further contends that the holding of the State court that a mere "potential possibility" of causing a "distraction" (Pet. 14-5) permits a restriction on freedom of speech and of the press notwithstanding the *Bridges* case and like decisions for the reason that a court has inherent power to prevent disturbances and disorder in the courtroom and because "The judge's interpretation and discretion as to what may distract or disconcert his court

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must be final." (Resp. Br. 18-9, 16.) If that be true then, so far as the Federal Constitution is concerned, State courts have arbitrary and unrestrained power to abridge the freedom of the press with respect to public trials and proceedings in the courts. In other words, the freedom of the press in this field, if any, depends upon the sensibilities, eccentricities, and caprice of each judge and not upon any substantive test or rule. Plainly, that is not the law. *Craig v. Harney*, 331 U. S. 367, 376-7.

4. Among errors in Respondent's statement of facts and proceedings below are the following:

(a) In an effort to create an impression that more than a momentary pause during the arraignment was occasioned by the Court's desire to inquire as to the identity of the person taking the picture, Respondent refers to a subsequent conversation between the Court and Petitioner Giaimo as though it had occurred during the arraignment. (Resp. Br. 7.) In fact the record on this point shows:

> "Q. What occurred as the picture was taken? A. There was a click and a flash and the Judge finished the sentence he was speaking and turned in our direction and asked, 'Who took that picture?'
>
> And Mr. Thomas said, 'I did.'
>
> And the Judge said, 'You remain here.'
>
> That took a few seconds. The Judge proceeded with the setting of the bond, and Mr. Towell said, 'Let the record show we reserve the right to withdraw the not-guilty plea.' " (Pr. R. 23.)

(b) Contrary to Respondent's assertion (Resp. Br. 18), the written charges alleged that Petitioners "entered the courtroom of said court and took a photograph showing Nelson J. Brewer being arraigned, *which photograph was later published* in The Cleveland Press, a daily newspaper of general circulation in the State of Ohio and par-

ticularly in Cuyahoga County, Ohio, *all of which was contrary to and in disobedience of the express order* made by the Honorable Joseph H. Silbert. * * *" (Pr. R. 2.)

(c) Contrary to Respondent's claim that Judge Silbert "merely mentioned" the Canons of Judicial Ethics to the newspaper reporters in his chambers as evidence that he was not being arbitrary or abusing his discretion (Resp. Br. 5), Judge Silbert expressly stated that he acted *solely* because of the recent adoption of the Canons by one of the two local bar associations (Pr. R. 14-5).

(d) Respondent repeatedly asserts either that the Petitioner Thomas or that all Petitioners had notice and full knowledge of the alleged order and were severally adjudged guilty of contempt for violating such order. (Resp. Br. 4, 5, 6, 9-10, 11, 23.) In fact, the court did not find Petitioner Thomas guilty of violating the alleged order but only of "disturbing the court" (Pet. App. A 23-4) and expressly stated that he was unable to find that Petitioner Thomas had known of the alleged order and had not relied upon established custom. (Pet. App. A 29-30.) Indeed, the testimony affirmatively established without contradiction that Petitioner Thomas knew nothing of the conversation in chambers between the Judge and two newspaper reporters. (Pr. R. 21, 31, 34, 40, 47.)

5. Respondent cites and quotes at length from *Ex Parte Sturm,* 152 Md. 114, 136 Atl. 312 (1927) which was decided many years before this Court in *Bridges v. California,* 314 U. S. 252 (1941) established the rule applicable to this case. As in the present case, respondent in the *Bridges* case relied upon state court decisions. However, this Court, in holding that such decisions could not be accepted as a guide, said:

> "* * * we cannot allow the mere existence of other untested state decisions to destroy the historic con-

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stitutional meaning of freedom of speech and of the press." (l. c. 268.)

In 1949 the Maryland court expressly recognized and adopted the rule laid down by this Court in *Bridges v. California*, 314 U. S. 252, *Pennekamp v. Florida*, 328 U. S. 331 and *Craig v. Harney*, 331 U. S. 367. *Baltimore Radio Show, Inc. v. State*, 193 Md. 300, 67 Atl. (2d) 497, 507-8 (cert. den. 338 U. S. 912).

CONCLUSION.

For the reasons stated in the petition and in this brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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